

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MATCH-E-BE-NASH-SHE-WISH BAND OF :

4 POTTAWATOMI INDIANS, :

5 Petitioner : No. 11-246

6 v. :

7 DAVID PATCHAK, ET AL. :

8 - - - - -x

9 and

10 - - - - -x

11 KEN L. SALAZAR, SECRETARY OF THE :

12 INTERIOR, ET AL., :

13 Petitioners : No. 11-247

14 v. :

15 DAVID PATCHAK, ET AL. :

16 - - - - -x

17 Washington, D.C.

18 Tuesday, April 24, 2012

19

20 The above-entitled matter came on for oral

21 argument before the Supreme Court of the United States

22 at 10:06 a.m.

23 APPEARANCES:

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1           Petitioners in No. 11-247.

2           PATRICIA A. MILLETT, ESQ., Washington, D.C.; for

3           Petitioner in No. 11-246.

4           MATTHEW T. NELSON, ESQ., Grand Rapids, Michigan; on

5           behalf of Respondents.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 11-246, Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak.

Mr. Miller.

ORAL ARGUMENT OF ERIC D. MILLER  
ON BEHALF OF THE PETITIONERS IN NO. 11-247

MR. MILLER: Mr. Chief Justice, and may it please the Court:

The suit in this case suffers from two independent jurisdictional defects, either one of which provides a basis for reversing the judgment of the Court of Appeals.

The first is that the United States has not waived its sovereign immunity from suits challenging its title to Indian trust lands. And the second is that Patchak, the plaintiff, lacks prudential standing because the interests that he seeks to vindicate in the suit are not within the zone of interests protected or regulated by section 5 of the -- of the Indian Reorganization Act, the provision whose alleged violation forms the basis for his complaint.

JUSTICE SOTOMAYOR: Could you tell me who you think would have a valid and timely APA action to

1 challenge what the Secretary has allegedly done here,  
2 which is to take lands into trust, in violation of the  
3 statute per our -- I know that the U.S. is challenging  
4 that assumption. But let's assume the reality of the  
5 allegation. Who would -- who would be able to challenge  
6 it and in what mechanism?

7 MR. MILLER: Well, there are -- there are two  
8 parts to that. And taking the timing question first,  
9 the claim would have to be brought before the land was  
10 taken into trust. And that's why the regulations set  
11 out a 30-day period after the announcement of the intent  
12 to take the land into trust before title is actually  
13 transferred. So somebody would have to file during that  
14 period, as the MichGO plaintiffs did --

15 JUSTICE SOTOMAYOR: That, I understand.  
16 That's why I said timely filed.

17 MR. MILLER: And the proper plaintiff for a  
18 claim under Section 5 -- and, of course, there can be  
19 other claims under NEPA or the IGRA -- but under Section  
20 5 of the IRA, the proper plaintiff would be a state or  
21 local government because those are the entities that are  
22 directly affected -- directly regulated by the transfer  
23 of jurisdiction to the tribe --

24 JUSTICE SOTOMAYOR: Let's assume a situation  
25 where you first promise the land to one tribe. And

1 then, in the midst of negotiations, another tribe lays  
2 claim. And the United States says, I change my mind;  
3 I'm going to give the land to the other tribe. Does the  
4 tribe that you have denied the land to have any standing  
5 or any rights with respect to challenging that  
6 determination?

7 MR. MILLER: Yes. As -- as the beneficiaries  
8 of Section 5, the -- the parties for whose benefit  
9 Congress acted and the Secretary would be acting, I  
10 think, in that scenario, a tribe would have standing to  
11 challenge it.

12 JUSTICE SCALIA: Mr. Miller, you -- you  
13 claim, on behalf of the government, that the decision of  
14 whether to take the land into trust has nothing to do  
15 with the use to which the land will be put; wherefore,  
16 these plaintiffs who are complaining about the use to  
17 which it'll be put have no standing.

18 If that is so, why did the government delay  
19 the taking into trust for three years while there was  
20 pending a lawsuit, which would have prevented the use  
21 that the government intended the -- the newly trusted  
22 land to be used for?

23 You delayed for three years because there was  
24 a challenge to whether you could use -- whether this  
25 land could be used for what you call gaming and I call

1 gambling.

2 Why did you delay for three years if it's  
3 irrelevant?

4 MR. MILLER: Well, the -- the challenge in  
5 that case was -- was not just to the use. It was to the  
6 decision to take title to land into trust. And the  
7 Secretary's policy, as set out in --

8 JUSTICE SCALIA: Well, wait. On what basis?  
9 On any basis other than --

10 MR. MILLER: There was a NEPA claim, for  
11 example. And the -- the plaintiff in that case, the  
12 MichGO organization, alleged that the Secretary had not  
13 complied with NEPA, had not adequately considered the  
14 environmental consequences of the action to take the  
15 land into trust.

16 JUSTICE SCALIA: Well, what -- what  
17 environmental action consequences are there from the  
18 mere decision to take it into trust? Unless you know  
19 what it's going to be used for, you have no idea what  
20 the environmental consequences are.

21 MR. MILLER: Well, that's -- that is true.  
22 And it is also true that -- that NEPA may, in some  
23 circumstances, require consideration of the use for  
24 which the land is to be put; but, it doesn't follow that  
25 Section 5 requires or -- or contemplates protecting the

1 interests of nearby landowners from the use.

2 JUSTICE SCALIA: But the challenge was to --  
3 was to the transfer, you say.

4 MR. MILLER: That -- I mean, that was -- the  
5 allegation --

6 JUSTICE SCALIA: Based in part on the use to  
7 which it was going to be put, right.

8 MR. MILLER: Right. But what -- what MichGO  
9 was seeking -- what the plaintiff was seeking in that  
10 case, was an injunction barring the transfer. And the  
11 Secretary's policy -- the whole point of the 30-day  
12 regulation is to allow people who want to challenge the  
13 transfer to have a full opportunity to litigate those  
14 claims. And that is why --

15 JUSTICE GINSBURG: And that would be true of  
16 Mr. Patchak? And suppose he had filed in the 30-day  
17 window. The -- the Secretary gives notice to affected  
18 persons. So he comes in and he says, I think that you  
19 don't have authority to do it because this tribe wasn't  
20 under Federal jurisdiction. And so I want you to  
21 call -- call it off. Nothing -- nothing has been  
22 transferred within 30 days.

23 I thought both your brief and the tribe's  
24 brief said that the -- that the judicial review would be  
25 available to any affected person who used that



1 procedure. Is that -- is that true?

2 MR. MILLER: I mean, if -- if they could  
3 establish standing, but if -- if he had filed within the  
4 30-day period, the Secretary would not take title to the  
5 land until there was a full opportunity for judicial  
6 review. Now, in this case, he filed outside the 30-day  
7 period. He was aware --

8 JUSTICE GINSBURG: But you said -- you said  
9 it was important if. So the -- the argument is this  
10 tribe wasn't under Federal jurisdiction. I could raise  
11 that because I'm an affected person. Somebody's got to  
12 be able to enforce against the Secretary the limitations  
13 that Congress put on the Secretary. So would there be  
14 standing in that situation?

15 Mr. Patchak comes in, within the 30-day  
16 period, so he's not trying to undo any done deal.

17 MR. MILLER: There would not be standing for  
18 Patchak as a private individual, but there would be  
19 standing for a state or local government or, in  
20 the unusual situation that Justice Sotomayor suggested,  
21 for -- for another tribe --

22 JUSTICE GINSBURG: So then you disagree with  
23 the tribe that said, in no uncertain terms, in its reply  
24 brief, that this case is not about the availability of  
25 judicial review. Judicial review was available in the

1 30-day window.

2 MR. MILLER: I think we don't disagree with  
3 that in the context of the discussion of the sovereign  
4 immunity issue. I don't understand that statement in  
5 the tribe's brief to have been a concession that there  
6 would have been standing.

7 JUSTICE KAGAN: Well, on the standing point,  
8 I mean, does -- does the -- the distinction that you're  
9 setting up between acquisition of land and use of  
10 land -- this goes back to Justice Scalia's question --  
11 that strikes me as -- as artificial, that the question  
12 of when land is acquired is all tied up with the  
13 question of what use is going to be made of it.

14 The government doesn't acquire this land with  
15 no object in mind. It thinks about how the land is  
16 going to be used. So that, in the end, this really is a  
17 land use statute, isn't it?

18 MR. MILLER: Well, it is a land use statute  
19 in -- in this sense, in the sense that -- and you're  
20 right, that the regulations do refer to the purposes for  
21 which the land is to be used. But that's because --

22 JUSTICE KAGAN: And the statute, as well,  
23 thinks of this as a -- as a -- is a statute that's  
24 designed to promote economic development, which is  
25 dependent on some understanding of how the land is

1 actually going to be used by the tribes.

2 MR. MILLER: That -- that is exactly right.

3 And that's why, in determining whether -- the Secretary  
4 has to take account of use, in order to determine  
5 whether it will, in fact, serve the interest of  
6 promoting tribal economic development and  
7 self-governance. But it doesn't follow that the effect  
8 of that use on bystanders, on other property owners  
9 in -- in the vicinity, is within the interests that  
10 Congress had in mind --

11 JUSTICE SCALIA: Why not? Of course, it  
12 doesn't have to be within the interest. It just has to  
13 be arguably within the interest. That -- that adverb  
14 is -- is left out in much of the discussion. But if,  
15 indeed, the use of the land is one of the elements to be  
16 considered in -- in taking title, why isn't somebody who  
17 is affected by the proposed use within the zone of  
18 interest?

19 MR. MILLER: Because -- I mean, just to -- to  
20 take the facts of this case as an example, you know,  
21 Patchak's objection is not to the jurisdictional  
22 transfer. It's not to the -- the fact that this is now  
23 going to be tribal land, rather than land subject to the  
24 taxing or regulatory authority of the State of Michigan  
25 or Allegan County --

1 CHIEF JUSTICE ROBERTS: Just to interrupt, in  
2 other words, it's not to the title?

3 MR. MILLER: Well, I mean -- that is -- the  
4 relief he is trying to get is to undo that, but the --  
5 the injury doesn't come from that.

6 CHIEF JUSTICE ROBERTS: I'm sorry.

7 MR. MILLER: The -- the injury comes from --  
8 the fact that the land is going to be used for gaming.  
9 But in 1934 --

10 JUSTICE SCALIA: You could put that it way.  
11 Or you could put it that the injury comes from the  
12 government's taking title for gaming. Okay? You could  
13 put it that way as well.

14 MR. MILLER: But --

15 JUSTICE SCALIA: Inasmuch as the government  
16 always has a purpose in mind when it takes title.

17 MR. MILLER: But, for the zone of interest  
18 test, the question would be are people who may be  
19 adversely affected by gaming on Indian land within the  
20 zone of interest -- is that interest, arguably,  
21 something that tribe -- Congress was speaking to --

22 JUSTICE SOTOMAYOR: I'm a little confused.  
23 The government --

24 JUSTICE KENNEDY: On what date was it -- on  
25 what date was it clear that the use would be gaming?

1 There is some suggestion in the briefs that, oh, well,  
2 it could be light industry, and it was zoned for  
3 economic use, generally. At what point was it  
4 acknowledged by all that this would be for gaming? At  
5 the very outset?

6 MR. MILLER: I believe that, in applying to  
7 have the land taken into trust, the tribe said what --

8 JUSTICE KENNEDY: At the very outset.

9 MR. MILLER: -- it wanted to -- to happen.

10 JUSTICE ALITO: What would happen if someone  
11 filed a challenge within the 30-day period and then the  
12 government took title to the land while the litigation  
13 was pending? Are the -- do the regulations preclude  
14 that from happening while the litigation continues? Or  
15 is it necessary for the -- the challenger to obtain a  
16 stay from a court?

17 MR. MILLER: The regulations do not address  
18 that. The BIA manual provides that that action, of  
19 taking the land into trust, should not be taken while  
20 the litigation is pending.

21 JUSTICE ALITO: Well, is that enforceable?

22 MR. MILLER: I -- I think that it would not  
23 be, but I think that -- I guess I would say two things  
24 about that. The first is that the Secretary enacted  
25 these regulations -- the 30-day notice rule, precisely

1 for the purpose of ensuring that there would be an  
2 adequate opportunity for judicial review and, thus,  
3 removing the constitutional doubt that the Eighth  
4 Circuit had found associated with the IRA.

5 And I think -- so there is every reason to  
6 think that the Secretary is going to conscientiously  
7 carry out what those regulations provide for, which is  
8 allowing judicial review. And if the Secretary were  
9 ever to do that, I think he would find that, going  
10 forward in every case, courts would enter a stay.

11 CHIEF JUSTICE ROBERTS: Well, they didn't  
12 hear. I mean, when Patchak filed his suit, title had  
13 not yet passed to the Secretary. And he sought a stay.

14 MR. MILLER: And -- and it was -- it was  
15 denied. And he could have sought relief from the court  
16 of appeals, and he didn't.

17 CHIEF JUSTICE ROBERTS: But nothing -- at  
18 that point, you thought nothing prevented the Secretary  
19 from moving forward. And, in fact, the Secretary did  
20 move forward, even though he had already filed the suit.

21 MR. MILLER: That -- yes.

22 JUSTICE BREYER: All right. Well, then why  
23 isn't it like your 30 days?

24 MR. MILLER: Well, because this was a suit  
25 that was not filed within the 30-day period. The --

1 JUSTICE BREYER: So what?

2 MR. MILLER: They --

3 JUSTICE BREYER: The -- can I -- the -- this  
4 is exactly the point that I don't understand. Forget  
5 standing for a moment. I'm just thinking of your quiet  
6 title action.

7 This wasn't an action to quiet title at all.  
8 This was a -- I looked at the complaint, as I -- as I  
9 gather from his questions, so did the Chief Justice.  
10 And it is a complaint filed before the -- the property  
11 was taken into trust. And it asks for an injunction  
12 under the APA, it wants review of that, before the  
13 government has any title to it at all -- or at least it  
14 hasn't taken it into trust.

15 So why are we considering quiet title? What  
16 has that to do with this? Why isn't it exactly what --  
17 now, that's the same as the Chief Justice asked, and I  
18 have exactly the same question.

19 MR. MILLER: Right. Well -- and, in that  
20 period before the land is taken into trust, the APA,  
21 everyone agrees, permits -- permits that litigation.

22 JUSTICE BREYER: Well, all right. Well, why  
23 isn't that -- that's the end of that argument, then,  
24 isn't it? Because this suit was brought seeking an  
25 injunction before the land was taken into trust; the

1 district court denies the request for the injunction.  
2 The court of appeals reverses that. And so there we  
3 are. We're reviewing that action by the court of  
4 appeals, reviewing a judge who said you are not entitled  
5 to an injunction sought before the land was taken into  
6 trust.

7 MR. MILLER: Because, at this point, the  
8 question of whether to enjoin the transfer from taking  
9 place is moot because --

10 JUSTICE BREYER: Oh, I don't know about that.  
11 Well --

12 MR. MILLER: The -- the relief that's being  
13 sought now -- and this is made clear in Patchak's brief  
14 in the court of appeals -- is an order compelling the  
15 Secretary to relinquish the title to the land. And so  
16 that --

17 JUSTICE BREYER: Well, I don't know how --  
18 how we should treat that. There was an order. Suppose  
19 that order was wrong. Suppose they should have granted  
20 the injunction. Then isn't what we should do, send it  
21 back because that injunction should have been granted,  
22 then have a hearing or trial or whatever you want to  
23 have on whether the Act applies, and then figure out how  
24 you do relief? Which I don't know.

25 MR. MILLER: No. The -- the time to seek



1 review of whether to enjoin a not-yet-completed transfer  
2 is before the transfer is completed. I mean --

3 JUSTICE BREYER: They did.

4 MR. MILLER: But -- and, if he wanted to  
5 appeal the district court's denial of that injunction,  
6 he -- he could have done so as of right under --

7 JUSTICE BREYER: He didn't appeal that. He  
8 appealed --

9 MR. MILLER: He did not appeal the denial of  
10 the injunction.

11 JUSTICE KENNEDY: Well, then your -- your  
12 argument is just one of timing and not the fact that the  
13 reliance is on the -- is on the QTA. The -- the tribe  
14 says, isn't it ironic that, if you really have a claim  
15 in the land as a property owner, you can't sue under the  
16 quiet -- QTA, and this person is much further removed.  
17 Well, that's because he has a different ground for  
18 relief. That's all we're talking about.

19 MR. MILLER: Well, the --

20 JUSTICE KENNEDY: So the fact that the QTA  
21 suddenly, deus ex machina, pops onto the scene, that  
22 doesn't mean that it -- that that changes his -- his  
23 ground for relief that he's -- that he's relying upon.  
24 His ground of relief has always been the same, APA.

25 MR. MILLER: Well, with -- with respect, Your

1 Honor, once the land is taken into trust, the -- the  
2 only effective relief would be an order taking the land  
3 out of trust. And that's what brings this within the  
4 scope of the QTA.

5 JUSTICE ALITO: Well, that depends on whether  
6 sovereign immunity is judged as of the time of the  
7 filing of the complaint or as of the time of the  
8 litigation of the sovereign immunity claim, right? And  
9 you claim -- you don't want us to address that issue.

10 MR. MILLER: We -- we think it's -- it's not  
11 properly before the Court. But I -- one thing I would  
12 just say about that is it is not remarkable -- or it  
13 often happens that, as the nature of the claims or the  
14 identity of the parties changes throughout the course of  
15 litigation, sovereign immunity can bar a suit that  
16 wouldn't have been barred before.

17 And one example of that is under the Westfall  
18 Act. Somebody sues an officer of the United States for  
19 a tort. That suit can go forward. But if the Attorney  
20 General then certifies, under the Westfall Act, that the  
21 employee was acting within the scope of his or her  
22 duties, then it gets converted into an action against  
23 the United States, which might -- if it falls within one  
24 of the FTCA exceptions, be brought --

25 JUSTICE SCALIA: But the Act provides for

1 that. The Act provides for that, right?

2 MR. MILLER: Well, but that -- that's just an  
3 example of how, as -- as the parties, or the relief --  
4 here, it's the relief -- changes, sovereign immunity can  
5 bar an action.

6 If I could reserve the remainder of my time?

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Ms. Millett.

9 ORAL ARGUMENT OF PATRICIA A. MILLETT

10 ON BEHALF OF THE PETITIONER IN NO. 11-246

11 MS. MILLETT: Mr. Chief Justice, and may it  
12 please the Court:

13 When you strip title to land, which is a fact  
14 in this case, you strip sovereignty. You wreak havoc on  
15 ongoing governmental operations, you -- on criminal  
16 jurisdiction, civil jurisdiction, the backdrop against  
17 which contracts were negotiated, investment decisions  
18 made and economic development undertaken.

19 That is why the Congress of the United States  
20 and this Court, in Coeur D'Alene, have never allowed  
21 injunctive relief to strip the United States of title  
22 that it has. The essence of sovereign immunity is,  
23 right or wrong, you cannot take title away that the  
24 United States has.

25 JUSTICE SCALIA: Well, is -- is that in

1 the -- is that in the Administrative Procedure Act? I  
2 thought the Administrative Procedure Act eliminates  
3 the -- the old bugaboo of sovereign immunity and says  
4 when it -- when it will stand and when it -- when it  
5 won't.

6 MS. MILLETT: The --

7 JUSTICE SCALIA: And if you're relying on the  
8 Quiet Title Act, that -- that clearly covers only suits  
9 which seek to say, I own the land, rather than the  
10 government, and this is not such a suit. So I don't see  
11 why normal APA principles wouldn't govern.

12 MS. MILLETT: For two reasons, Justice  
13 Scalia. Because the APA itself -- and this is on page  
14 6a of the addendum to our brief -- says that it does not  
15 waive sovereign immunity and does not grant relief if  
16 another statute expressly or impliedly forecloses the  
17 relief that is sought. And the Quiet Title  
18 Act says to -- you cannot have an injunction stripping  
19 the United States of land, period. And you cannot have  
20 any litigation over title --

21 JUSTICE SCALIA: No, but the relief to be  
22 sought under the Quiet Title Act is title in the  
23 plaintiff. That's the relief ultimately sought.

24 MS. MILLETT: No --

25 JUSTICE SCALIA: Now, on the way to that, you

1 may -- you may get some injunctive remedy, but the --  
2 the basis for the lawsuit is -- is not, I own the land.

3 MS. MILLETT: With respect, Justice Scalia,  
4 you can get no injunctive relief whatsoever, even if you  
5 are asserting title. But the Quiet Title Act itself is  
6 brought -- it limits relief to monetary compensation,  
7 unless the government agrees to a specific relief.

8 JUSTICE SCALIA: Relief in that kind of suit,  
9 yes.

10 MS. MILLETT: Yes --

11 JUSTICE SCALIA: Relief in that kind of suit.  
12 But this is not that kind of suit.

13 MS. MILLETT: But -- no. Justice Scalia,  
14 with respect, on page -- this is 2a of the addendum to  
15 our brief, 2409a(a), the type of suit that is addressed,  
16 and to which the Indian lands exception applies, is a  
17 suit -- and I'm reading here from the second line of  
18 a(a). "A civil action" --

19 JUSTICE SCALIA: Excuse me. I guess I've  
20 lost you.

21 MS. MILLETT: I'm sorry. I'm on the addendum  
22 to our -- the blue brief, 2a, and this is the Quiet  
23 Title Act.

24 JUSTICE SCALIA: Okay.

25 MS. MILLETT: And right -- subsection (a),

1 the second line. All right? "The waiver of sovereign  
2 immunity is for a civil action under this section to  
3 adjudicate a disputed title." It does not say --

4 JUSTICE KAGAN: Ms. Millett, it also says,  
5 "under this section."

6 MS. MILLETT: Yes.

7 JUSTICE KAGAN: And the section describes the  
8 complaint. It says, "The complainant shall set forth  
9 with particularity the nature of the right, title, or  
10 interest which the plaintiff claims."

11 So the type of suit that this section has in  
12 mind is a suit in which the plaintiff claims a right,  
13 title, or interest. And the language that you read,  
14 "under this section," well, that's what this section is  
15 about, a suit in which a plaintiff claims the right,  
16 title, or interest.

17 MS. MILLETT: No, Justice Kagan, in this  
18 respect, that tells you what you have to do if you are  
19 allowed to proceed under the statute to win, the first  
20 step of what you have to do. But what subsection (a)  
21 says is what is carved out, what is a wholesale -- and  
22 this Court said in *Mottaz*, a retention of immunity, even  
23 in the face of arguments that the government has done  
24 wrong administratively, as in *Mottaz*. What you do --  
25 have done is retain immunity.

1           When the -- the section here, right under the  
2 sentence I read, Justice Scalia, about this section does  
3 not apply to trust or restricted Indian lands, what that  
4 meant was that this -- that Congress, against a backdrop  
5 of complete immunity, said, we've looked at lands, we've  
6 studied what we're doing, and we are not doing two  
7 things, and we're going to be explicit about it. We are  
8 not letting you touch Indian lands. The United  
9 States may not be named --

10           JUSTICE SCALIA: You can say that again and  
11 again, Counsel, but it does say, "under this section."  
12 And I don't -- I don't know how you get out from under  
13 that. It says, "under this section."

14           MS. MILLETT: The -- this --

15           JUSTICE SCALIA: And if this section applies  
16 only to suits seeking to assert title on the part of a  
17 plaintiff, it's not under this section.

18           MS. MILLETT: This -- they -- this section  
19 is, I think, defined by what -- Congress' waiver of  
20 sovereign immunity. And it didn't say we're waiving  
21 sovereign immunity for quiet title actions. It says for  
22 a civil action in which the United States' title is  
23 disputed. So quieting U.S. title --

24           JUSTICE BREYER: But that -- but you don't --  
25 you can't believe that totally because you agree there

1 is some APA review of an action brought before the title  
2 shifts, where the claim is you cannot take title,  
3 Secretary. You agree with that. You can bring some.

4 MS. MILLETT: Absolutely. Before title --

5 JUSTICE BREYER: Okay. Once you agree to  
6 that, I stop at the words, not just "under this  
7 section," but "to adjudicate a disputed title to real  
8 property."

9 Then I read his complaint. His complaint, on  
10 31 to 38, is asking for an injunction. And it's asking  
11 for an injunction before they take any title to the  
12 property. And maybe they went ahead and did it anyway.  
13 But is there -- is there some other complaint that I  
14 didn't read? Is there some amendment to the complaint  
15 in the record? If so, where is it?

16 MS. MILLETT: I think there's a constructive  
17 amendment in this sense because, if the only  
18 thing with --

19 JUSTICE BREYER: I don't know about a  
20 constructive amendment is.

21 MS. MILLETT: Well, let me see if I can  
22 explain. If I can explain? To be sure, the complaint,  
23 which was untimely filed for purposes of the protection  
24 of the government's not taking it into -- into trust,  
25 but the set -- it did seek to stop the decision from



1 happening.

2           After that happened, when he did not seek  
3 appeal or emergency relief from the district court not  
4 giving him the injunction he asked for -- he asked for a  
5 preliminary injunction to stop the taking of title. The  
6 district court didn't give it. It actually sat on it,  
7 constructively denied it. And it's well-recognized in  
8 courts of appeals. You can appeal a constructive denial  
9 of a preliminary injunction. He didn't do that.

10           This is the way litigation works. Title  
11 shifted. Sovereign immunity shifted. The Quiet Title  
12 Act didn't apply, then it did apply because title was in  
13 the hand and in the name of the United States  
14 Government.

15           JUSTICE SCALIA: I thought you were going to  
16 answer how his -- his complaint constructively changed.

17           MS. MILLETT: And so, after that, he had two  
18 choices. He can dismiss the action as moot. But what  
19 happened is he continued to press -- and this is on page  
20 25 of his brief, his court of appeals brief, at page 26  
21 and 27 -- he wants an injunction now, not to stop title,  
22 but to take title out. And that's when the Quiet Title  
23 Act --

24           JUSTICE SCALIA: I thought you were going to  
25 tell us how it constructively changed to be an action

1 seeking to have a decree that title was in him, which is  
2 what the QTA covers.

3 MS. MILLETT: No, it was --

4 JUSTICE SCALIA: Okay.

5 MS. MILLETT: No, because the Quiet Title  
6 Act --

7 JUSTICE SCALIA: So even constructively, it  
8 hasn't turned into that?

9 MS. MILLETT: The Quiet Title Act, when it  
10 says -- when it says the only way we'll give you a  
11 relief is if you can establish that you have an interest  
12 in the land, forecloses suits attaching -- seeking to  
13 adjudicate -- adjudicate, excuse me -- disputed U.S.  
14 title by those who don't even have an interest.

15 JUSTICE SOTOMAYOR: Counsel --

16 MS. MILLETT: And against the back -- I'm  
17 sorry.

18 JUSTICE SOTOMAYOR: Counsel, you're assuming  
19 that the statute was passed against a backdrop of  
20 complete sovereign immunity. But, if you look at Larson  
21 and Malone, it appears as if, prior to the enactment of  
22 the QTA, people could bring suits to say that an officer  
23 had acted beyond his or her statutory authority. So  
24 what the Quiet Title Act did was encapsulate some of  
25 that law.

1           From where do we draw the conclusion that the  
2 intent was to eliminate every other claim that could be  
3 brought under something like the APA or an officer suit?

4           MS. MILLETT: To be clear, as Justice Scalia  
5 himself then testified before Congress, the law was a  
6 mess. And you could not discern anything from Larson,  
7 Malone. And the one area where, actually, courts have  
8 pretty consistently denied relief, as Justice Scalia  
9 then said, was in the land area.

10           And Congress responded to hardship. But, in  
11 doing so, it was making a critical balance. It knew how  
12 disruptive to government it is to pull the rug out from  
13 under the feet of the Federal Government's operations.

14           And -- and it said we're going to draw lines,  
15 and there's three lines. It said no suits involving  
16 Indian lands, no injunctive relief or coercive  
17 injunctive relief at all will be allowed. If 00 if you  
18 have a right, you will only get damages, unless the  
19 government agrees otherwise. And to prevail, you must  
20 have an interest in land.

21           Now, that is a concerted judgment of Congress  
22 that we will not --

23           CHIEF JUSTICE ROBERTS: Could I say, just for  
24 a moment, let's suppose the tribe -- the -- the --  
25 Mr. Patchak brings a nuisance action against the tribe

1 for running a casino and imposing all these difficulties  
2 on the surrounding previously rural community. He says  
3 this is a nuisance.

4 And the tribe answers and says, no, we can do  
5 this under the Indian Gaming Regulation Act. And  
6 Patchak then says, well, no, because you don't have  
7 valid authority under that Act because the Secretary  
8 shouldn't have taken the land into title.

9 Now, that is not a quiet title action. That  
10 is a nuisance action. Can he have that adjudicated in  
11 that suit?

12 MS. MILLETT: He could -- he could bring a  
13 nuisance action, assuming the tribe waives sovereign  
14 immunity, which would be its own problem. Assuming --  
15 I'm assuming you're -- this is a suit against the tribe  
16 and not the Secretary.

17 CHIEF JUSTICE ROBERTS: Right, right.

18 MS. MILLETT: And so there would be their own  
19 either state law or sovereign immunity questions if he  
20 could bring it. And then if the government tried to  
21 raise this -- or, excuse me, the tribe raised it as a  
22 preemption defense, then there would be a separate  
23 question whether, at that point, a court could issue,  
24 consistent with the Quiet Title Act, a declaratory  
25 judgment, which would pull the rug out from the

1 government's feet.

2 CHIEF JUSTICE ROBERTS: Right. But there'd  
3 be no --

4 MS. MILLETT: Now, to be sure, in the --

5 CHIEF JUSTICE ROBERTS: -- question of his  
6 ability to sue and put that question at issue.

7 MS. MILLETT: There is no question he could  
8 bring a -- assuming tribal sovereign immunity, that he  
9 could bring a nuisance action. But it's also important  
10 to remember, in that context, the other reason that  
11 nuisance action would fail is that the courts have  
12 already ruled on this claim, about the legitimacy of  
13 authorization of gambling, about the environmental  
14 effects and esthetic effects in the MichGO litigation.  
15 This is simply recycled through the IRA claims that have  
16 already been adjudicated and lost.

17 CHIEF JUSTICE ROBERTS: Well, but that's a  
18 question that's not before us.

19 MS. MILLETT: But with respect to the  
20 question of judicial review that was mentioned earlier  
21 and I think would be implicated, obviously, in a  
22 nuisance action -- this is sort of being case specific  
23 with respect to claim preclusion and issues like that.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 MS. MILLETT: Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Mr. Nelson.

2 ORAL ARGUMENT OF MATTHEW T. NELSON

3 ON BEHALF OF THE RESPONDENTS

4 MR. NELSON: Thank you, Mr. Chief Justice,  
5 and may it please the Court:

6 This is a classic APA action. Mr. Patchak is  
7 challenging unlawful agency action. Mr. Patchak is not  
8 asserting a quiet title action, where someone asserts an  
9 interest in property owned by the government and is  
10 trying to get that property back.

11 And as this Court has already discussed, the  
12 best evidence of that is the fact that Mr. Patchak filed  
13 this suit before the land was taken into trust. The  
14 fact that the government subsequently took the land did  
15 not affect the nature of Mr. Patchak's lawsuit.

16 JUSTICE GINSBURG: But he didn't file it  
17 within the 30-day window, so that -- that is -- there  
18 was a clear track. He could have filed within 30 days,  
19 and at least the government tells us that that would  
20 have been subject to judicial review, the ruling made  
21 within -- and that nothing would go on until that action  
22 was cleared.

23 So why, if he could have sued early, before  
24 any title transfer, why isn't that all the relief  
25 someone in his position would be entitled to? Why

1 should he be allowed to wait? I mean, the whole purpose  
2 of the 30-day window is to get people to state their  
3 objections.

4 MR. NELSON: Justice Ginsburg, the 30-day  
5 window is a notice period. Mr. Patchak did, in fact,  
6 file his lawsuit within the 6-year statute of  
7 limitations provided by Congress for APA claims. And  
8 the reason that the Secretary adopted the 30-day notice  
9 provision is the very argument that we believe is  
10 misplaced here, namely, that the Quiet Title Act springs  
11 up to bar judicial review after the land is taken into  
12 trust.

13 We don't believe that's the case because  
14 Mr. Patchak is not asserting a Quiet Title Act action,  
15 which is limited to those claims where someone says,  
16 this is my property and I want it back or, with regard  
17 to the government, at least pay me for it.

18 JUSTICE SCALIA: You -- you say the 30-day  
19 window only applies to quiet title actions?

20 MR. NELSON: Your Honor, the 30-day window --  
21 if -- yes, if someone was asserting a quiet title  
22 action, the 30-day window would apply.

23 JUSTICE GINSBURG: But --

24 JUSTICE SCALIA: Well, surely -- surely, the  
25 30-day envisions comments by anybody, not just people

1 who claim to own the property, doesn't it?

2 MR. NELSON: Your Honor, certainly, it  
3 provides for comments, in that people can come and  
4 assert their comments, absolutely. But it doesn't  
5 prevent someone from asserting a lawsuit.

6 JUSTICE SOTOMAYOR: Would you have been  
7 entitled to file in that 30-day period? How is your  
8 claim, the one that you ultimately made, any different  
9 than what you would have done, if you had filed within  
10 the 30 days?

11 MR. NELSON: Justice Sotomayor --

12 JUSTICE SOTOMAYOR: Same claim, right.

13 MR. NELSON: It is the same claim, yes, Your  
14 Honor.

15 JUSTICE SOTOMAYOR: All right. Tell me what  
16 relief you're seeking that's different than the -- are  
17 you -- what relief are you seeking? Aren't you seeking  
18 to shed the United States of its title?

19 MR. NELSON: Your Honor, the relief that --

20 JUSTICE SOTOMAYOR: Just the -- what's the --  
21 don't tell me what your cause of action is. What  
22 relief, at the end of the day, do you want?

23 MR. NELSON: Justice Sotomayor, Mr. Patchak  
24 is seeking a declaratory judgment that the decision of  
25 the Secretary that it can take land into trust for this



1 particular band of Indians is incorrect, that -- and  
2 that, therefore, the decision to do so is ultra vires;  
3 and, as an incident to that relief, now that the  
4 government has taken the land into trust, that the land  
5 now be taken out of trust.

6           That does not convert this, though, into a  
7 quiet title action because Mr. Patchak is not asserting  
8 an interest in the property itself. The relief of the  
9 quiet title action provides -- has two parts. It both  
10 provides for -- that title will be taken from the  
11 government and that title will be quieted in the  
12 plaintiff.

13           The relief that Mr. Patchak is seeking does  
14 not include quieting title in himself.

15           JUSTICE KAGAN: Mr. Nelson, putting that  
16 question aside of whether this is or isn't a quiet title  
17 action, or -- there's another question, which is whether  
18 sovereign immunity can come into effect after a suit has  
19 been filed. It seems to me a hard question and one that  
20 has not been briefed by either party particularly.

21           So I just ask you, is there case -- is  
22 there -- are there any cases that you can point to that  
23 suggest that sovereign immunity cannot come into effect  
24 after a suit has been filed? Because what the  
25 government says is, you know, circumstances change,

1 conditions change on the ground, sovereign immunity can  
2 pop up where it didn't exist before. Is there any  
3 precedent that you have to negate that?

4 MR. NELSON: Your Honor, I -- I am not, at  
5 this time, prepared to say that there is or is not. I  
6 do know that we have cited in the footnote in our brief  
7 the -- I believe it's the Grupo Dataflux case that  
8 indicates that jurisdiction is decided at the time that  
9 the complaint is filed. Because the D.C. Circuit  
10 specifically reserved this -- this issue, we did not  
11 believe this issue was before the Court.

12 JUSTICE GINSBURG: The government answers to  
13 that, that's in diversity -- you know, you determine  
14 citizenship as of the date the complaint is filed.  
15 Citizenship of a party changes, so, if it coincides with  
16 someone on the other side of the -- of the line, it  
17 doesn't matter. But do you have cases, other than  
18 diversity cases, where the filing of the complaint --  
19 nothing happens, nothing that can happen after affects  
20 the -- the jurisdiction as set as of the time the  
21 complaint is filed?

22 I don't know outside diversity where this  
23 principle has applied.

24 MR. NELSON: Your Honor, I am not, at this  
25 time, aware of any cases. I'm not, unfortunately, in a

1 position to say that the cases do not exist or do -- or  
2 do exist. I believe the issue was addressed in the D.C.  
3 Circuit briefing, but I'm not aware, at this time, of  
4 any cases that would -- that address this specific  
5 issue.

6 CHIEF JUSTICE ROBERTS: The Solicitor  
7 General, in footnote 1 of his reply brief, says that's  
8 the general rule, which I take it there might be  
9 exceptions to it.

10 MR. NELSON: Exceptions.

11 CHIEF JUSTICE ROBERTS: But I'm sure he'll  
12 tell us what those are.

13 JUSTICE SOTOMAYOR: Counsel, is there any  
14 limit to who can bring an APA action under your theory?  
15 It seems, to me, that what you're saying is that anyone,  
16 other than a landowner, because of the Quiet Title Act,  
17 can, within 6 years, attempt to unravel any decision the  
18 government has made to take land because we're not  
19 limited now to trust lands.

20 We're limited -- under your theory, whenever  
21 the government takes any kind of land, anyone's entitled  
22 to come in and challenge that action under the APA for 6  
23 years and to seek an injunction because it isn't a quiet  
24 title action. It's merely a challenge to the decision  
25 to take land.

1           Is there any limit to your theory as to who  
2 can bring that kind of action and --

3           MR. NELSON: Justice Sotomayor, yes, there is  
4 a limit on who may assert these actions. First, with  
5 regard to this Court's prudential standing analysis,  
6 would obviously provide a limitation. But, second, with  
7 regard --

8           JUSTICE SOTOMAYOR: In which way? You're  
9 saying anyone who is affected, your niece, your farm  
10 owner's niece, who comes to visit twice a year or visits  
11 the land and walks through it, could presumably say, I'm  
12 negatively affected by the government's taking of this  
13 land, Indian or not, within the 6 years, and the  
14 government improperly took the land, undo it.

15          MR. NELSON: No, Your Honor. I don't believe  
16 that my -- that my client's niece would have prudential  
17 standing because I don't think that you could -- that  
18 that person would -- arguably, would be within the zone  
19 of interests to assert that claim. I -- I think that  
20 the zone of interest test does exclude people who might  
21 have Article III standing from asserting these types of  
22 claims.

23          JUSTICE SCALIA: I thought that -- I -- maybe  
24 I'm wrong, but the government will correct me if I am.  
25 The -- I thought the government concedes that a NEPA

1 action could -- could be brought when the government is  
2 taking land to use for a particular use. Let's say  
3 it's -- it's taking land for a nuclear waste repository.  
4 Certainly, a NEPA action would -- would lie. You don't  
5 disagree with that, do you?

6 MR. NELSON: We don't disagree.

7 JUSTICE SCALIA: You're supposed to say, yes,  
8 sir, good.

9 (Laughter.)

10 JUSTICE SOTOMAYOR: No, but my question --  
11 counsel, my question was different. Under your theory,  
12 you could bring this suit after the land has been taken.  
13 NEPA assumes before the land was taken. I'm talking  
14 about, under your theory of law, once land has been  
15 taken by the U.S., if anyone has a viable legal claim  
16 that the land was taken improperly, whether it's Indian  
17 trust land or anyone else's land for any other purpose,  
18 that person, within 6 years, can still bring a suit  
19 under the APA.

20 MR. NELSON: Only to the extent that the land  
21 is taken as a result of administrative action.

22 JUSTICE BREYER: No, no, no. You can't -- I  
23 mean -- I --

24 JUSTICE SOTOMAYOR: Government land is always  
25 taken by administrative action.

1 MR. NELSON: I'm sorry.

2 JUSTICE BREYER: I thought -- I mean --  
3 sorry. You answer it as you want, according to your  
4 argument.

5 There is a difficult question here. The  
6 difficult question is what happens if one brings an  
7 ordinary APA suit before land is taken, before that suit  
8 can be decided, before that suit can be decided, the  
9 government takes the land. Does that transform it into  
10 a quiet title action?

11 The obvious answer, which isn't obvious at  
12 all, is that the answer is that it's a proper APA suit,  
13 if you bring it before they take it. And, if you bring  
14 it after they take it, it's a quiet title action.  
15 And -- and that would seem to me a first blush answer.

16 But I haven't found -- I mean, that's a  
17 question we don't -- I don't know if we have to answer  
18 that question. It seems to be quite difficult. And --  
19 and I don't know what authority there is. And it isn't  
20 fully argued in the briefs. So what -- isn't that  
21 what -- you're thinking -- I think Justice Sotomayor is  
22 thinking, well -- and you just said you can bring it  
23 after. I don't know if you can bring it after. So go  
24 answer now --

25 (Laughter.)

1 JUSTICE BREYER: And I want to hear what you  
2 say.

3 MR. NELSON: Thank you, Justice Breyer.  
4 The -- the fact that this -- the fact -- the fact that  
5 the land is taken into trust does not transform the  
6 action into a quiet title action simply because the  
7 government --

8 JUSTICE SOTOMAYOR: Forget about the trust.

9 MR. NELSON: Okay.

10 JUSTICE SOTOMAYOR: Because, under your  
11 theory of what -- what the APA permits you to do, any  
12 time the government takes land, whether into trust or  
13 for any other purpose, the APA permits someone within 6  
14 years, with whatever definition of prudential standing  
15 you want to give it, to come in after the taking and  
16 challenge that it was ultra vires, that it was done  
17 improperly. That's your theory.

18 So, going back to Justice Breyer's question,  
19 why isn't that within the quiet title action  
20 prohibition --

21 MR. NELSON: Your Honor --

22 JUSTICE SOTOMAYOR: -- once it's in the  
23 government's hands.

24 MR. NELSON: Once it's in the government's  
25 hands, it is -- it does not -- once the government

1 acquires the title, it does not change the nature of the  
2 APA action because the Quiet Title Act is limited to --

3 JUSTICE SCALIA: You're not -- you're  
4 answering the question with regard to an argument I  
5 don't think you've made and I don't think you would want  
6 to make. You're not asserting that the action can be  
7 brought anytime within 6 years after the government has  
8 already taken the land. You're just asserting that an  
9 action brought before the government takes the land does  
10 not change its character and become a quiet title action  
11 afterwards, right?

12 MR. NELSON: Yes, Your Honor.

13 JUSTICE SCALIA: You're not saying that  
14 anybody can bring, within 6 years after the government's  
15 taking, a suit; are you? I hope you're not arguing  
16 that.

17 JUSTICE SOTOMAYOR: But he is.

18 MR. NELSON: Absolutely not, Your Honor.

19 JUSTICE SCALIA: Thank you.

20 (Laughter.)

21 JUSTICE ALITO: What would happen now, as a  
22 practical matter, if Mr. Patchak were to -- were to  
23 prevail? I take -- I understand the -- the casino's  
24 built and running. So what would happen?

25 MR. NELSON: Your Honor, what would happen



1 here, to our understanding, is the land would be taken  
2 out of trust and would revert to the tribe.

3 JUSTICE GINSBURG: But I think the government  
4 told us that the land didn't belong to the tribe in the  
5 first place.

6 MR. NELSON: Your Honor, I'm not entirely  
7 sure as to what the status of the title was. Our  
8 understanding is that --

9 JUSTICE GINSBURG: Well, the government did  
10 say that the Band was not the prior owner of the tract.  
11 So where would it go?

12 MR. NELSON: Your Honor, the -- it -- it  
13 depends, in part, I believe, at this -- at that point,  
14 based on state law, what the effect of the Court's  
15 decision would be. Would it render the trust status  
16 void? If so, under Michigan law, the land would vest in  
17 the intended beneficiary, which is the tribe.

18 If it -- if it does not -- if the entire  
19 action would be undone, the land would revert back to  
20 the prior owner, which, to the best of my understanding,  
21 is a company that involves ownership, both by a group of  
22 Las Vegas investors and, also, to my understanding, the  
23 Band itself; although, I could be corrected on that.

24 JUSTICE SOTOMAYOR: Was that the -- I thought  
25 part of it was agricultural land and that another part

1 was a business. I mean, I think -- I thought -- well,  
2 the government can correct me.

3 MR. NELSON: Your Honor, the land itself was  
4 partially agricultural and partially light  
5 manufacturing. That was how it was zoned.

6 JUSTICE SOTOMAYOR: Right.

7 MR. NELSON: But it was all owned as a single  
8 parcel. The Bradley tract was, I believe, a single  
9 parcel for the purpose of --

10 JUSTICE BREYER: But your injury, your  
11 injury is that it's being used for gambling. So is  
12 there room for relief that would say the government can  
13 do what it wants to the land, it just can't let it be  
14 used for gambling, if you want.

15 And that -- that would cure your injury, and  
16 it wouldn't require the government to give back the  
17 land, and it wouldn't require any unscrambling, and  
18 title could rest in the government. I don't know if  
19 that's possible or not possible.

20 MR. NELSON: Your Honor, we -- we looked into  
21 and wanted to make an argument that, somehow, you could  
22 separate the trust title status and the Federal  
23 Government's fee simple interest. And, in looking at  
24 the deed itself, it doesn't look like that can be done.

25 JUSTICE KENNEDY: Well, what were the

1 provisions, if any, in the Indian Reorganization Act  
2 itself that show a concern for the kind of standing that  
3 you're alleging here?

4           It seems -- seems, to me, you're talking  
5 about environmental effects and so forth under the  
6 Indian Gaming Act; but, yet, your primary suit is under  
7 the Indian Reorganization Act. So I don't see -- I  
8 understand how that might give you standing. But how  
9 does it give you a cause of action for relief under the  
10 Indian Reorganization Act?

11           MR. NELSON: Your Honor, land --

12           JUSTICE KENNEDY: The Indian Reorganization  
13 Act, just to help pursue the question a little bit  
14 further, has a provision about the public interest, but  
15 not in the section which you're relying on. It doesn't  
16 say anything about the public interest.

17           MR. NELSON: Yes, Your Honor, Section 463 of  
18 the Indian Gaming Act --

19           JUSTICE KENNEDY: Well, 463 does, but you're  
20 going under 465.

21           MR. NELSON: Correct, we're under 465,  
22 Your Honor.

23           Justice Kennedy, I would point to the fact  
24 that the land is authorized to be taken into trust for  
25 Indians. And, when land is taken into trust, it

1 necessarily implicates the use. And, as soon as the use  
2 is implicated, anyone who is affected by that use --  
3 people who live in close proximity to that land are  
4 within -- are arguably within the scope of those people  
5 who Congress would expect to enforce --

6 JUSTICE KENNEDY: What is the specific  
7 provision of the -- of the IRA that you rely on? You --  
8 do you go back to 463? Because there's nothing in 465  
9 that answers your -- this question, I don't think.

10 MR. NELSON: Your Honor, I agree that Section  
11 465 does not specifically reference the public interest.  
12 It does, however -- the intent in 465 is to have land  
13 taken into trust. And I don't believe that you can  
14 separate the fact that the land is being taken into  
15 trust from the specific use to which it is being put.

16 Congress authorized the land to be taken into  
17 trust for a specific use. And you can see, in fact,  
18 that the government has reached the same conclusion.  
19 When you look at the regulations that the Secretary has  
20 adopted in consideration of Section 465, they not only  
21 address land use, the tribe has to identify the use to  
22 which the land will be put, but they also require the  
23 tribe to identify any conflicts of land use, which  
24 clearly addresses the fact that other people are going  
25 to be affected by the land use.

1                   Consequently, those -- and we believe  
2 those -- those regulations are subject to Chevron  
3 deference because they fall within the scope of the  
4 authority delegated to the Secretary, and they don't  
5 conflict with the -- the broad delegation there in  
6 the -- in Section 465. So --

7                   JUSTICE KENNEDY: That's -- that's helpful.  
8 Just a different question, going back to what -- Justice  
9 Alito's question. It -- it does seem that we -- we may  
10 be wasting our time. I'm not suggesting that the  
11 state -- that the case is moot, but you did wait for  
12 some three years before you brought this suit. The  
13 building was built. It seems, to me, there's a  
14 considerable laches problem. I suppose that's just not  
15 before us.

16                   MR. NELSON: Your Honor, in fact, the APA  
17 reserves the laches defense, and the laches defense has  
18 been asserted here. But I would point out that the  
19 casino hadn't -- was -- the casino did not open and they  
20 did not move forward with this until after the land was  
21 taken into trust, which was 6 months after this lawsuit  
22 was filed.

23                   At that point, in spite of the knowledge of  
24 this Court's decision in *Carcieri*, they made a  
25 reasonable business decision to move forward with this,

1 knowing the risk that they were taking that -- that the  
2 entire basis of them being able to -- to operate a  
3 casino and engage in Class III gambling could be  
4 overturned.

5 JUSTICE KAGAN: But, Mr. Nelson --

6 JUSTICE KENNEDY: But that was under the  
7 MichGO suit, not yours.

8 MR. NELSON: No, Your Honor. They knew that  
9 our suit had been filed --

10 JUSTICE KENNEDY: Oh, your suit had been  
11 filed at that point?

12 MR. NELSON: Correct.

13 JUSTICE KAGAN: Mr. Nelson, could I  
14 understand the scope of your argument? Because I had  
15 understood -- let's take the -- the timing question  
16 aside for a minute. Let's -- let's assume that you had  
17 filed this suit after title had transferred.

18 I had understood that your argument was, yes,  
19 you should be allowed to do that because, even though  
20 this was filed after title had transferred, yours is  
21 just not a quiet title action. And it's not a quiet  
22 title action because you're not seeking title yourself.  
23 Isn't that the question? Isn't that your argument?

24 MR. NELSON: Yes, Your Honor.

25 JUSTICE KAGAN: So your argument really has

1 nothing to do with the question of timing. Your  
2 argument would be the same, even if title had  
3 transferred prior to your filing your lawsuit?

4 MR. NELSON: Your Honor, we believe that that  
5 is a logical result, but we do not believe that the  
6 Court needs to address that issue in this case because  
7 our argument is much stronger than that because we did,  
8 in fact, file suit before the land was taken into trust.

9 JUSTICE KAGAN: Well, as I understood your  
10 brief, 49 pages of it were about one thing, and there's  
11 one footnote that's about something else.

12 In other words, all of your brief is  
13 basically saying, ours is just not a quiet title action,  
14 and so we should be allowed to proceed, irrespective of  
15 when the government acquires title. And then you have  
16 this little additional argument which says, by the way,  
17 we started this lawsuit before the government had title  
18 anyway.

19 So, I mean, the briefing in this case is all  
20 about what you now say is your weakest point.

21 MR. NELSON: Your Honor, I -- I would  
22 disagree that it is our weakest point, but I do agree  
23 that the -- that the -- that the logic here of the  
24 position, that this is not a Quiet Title Act action,  
25 means that, even if the government acquires title to the

1 land while the suit is pending, that, logically, it  
2 would then follow that the -- that the action remains an  
3 APA action, and it is not converted into a quiet title  
4 action.

5 JUSTICE SCALIA: I think you're right. I  
6 pushed you into it. It's my fault.

7 (Laughter.)

8 JUSTICE SCALIA: You're right.

9 CHIEF JUSTICE ROBERTS: And the proposition  
10 would be simply that the government can't go in and --  
11 and moot out a suit that was -- by its unilateral  
12 action, right?

13 MR. NELSON: Yes, Your Honor.

14 CHIEF JUSTICE ROBERTS: I mean, they seem to  
15 recognize that it would be a bad thing, since it's only  
16 by their grace, they've told us, that they don't do it  
17 right away anyway. They give people 30 days.

18 MR. NELSON: Correct, Your Honor. And --

19 JUSTICE GINSBURG: But didn't they --  
20 wasn't -- didn't they have some encouragement from a  
21 court of appeals, suggesting there might be a due  
22 process problem, if they didn't have that notice?

23 MR. NELSON: Your Honor, there was the Eighth  
24 Circuit decision, I believe it was United States v.  
25 South Dakota or South Dakota v. United States, in which



1 the court there found that the lack of judicial review  
2 pushed towards the conclusion that the Reorganization  
3 Act is an unconstitutional delegation of legislative  
4 authority.

5 And that was one of the reasons -- or that  
6 was the reason cited in the Federal Register for why the  
7 Department of Interior adopted the 30-day notice  
8 provision.

9 JUSTICE BREYER: I don't think Justice  
10 Scalia's argument was a bad argument. I thought it was  
11 a rather good argument. If, in fact, you go back and  
12 you take the view that any suit filed to review APA is  
13 not a quiet title action, people could go upset  
14 government title to property years and years later. And  
15 they would say, oh, well, we're not challenging the  
16 title, we're just challenging what happened when it was  
17 taken -- the title was taken.

18 Now, that can't be right, it seems to me,  
19 first blush. So, therefore, I thought you -- or yours  
20 was different because you filed before they took title.  
21 But, as I say, I'm uncertain of that distinction.

22 Now, your answer suggests you've been going  
23 both ways. Sometimes, you think, well, it matters that  
24 we filed before; and, other times, you think, no, it  
25 doesn't matter.

1 JUSTICE SOTOMAYOR: Is that because you don't  
2 have a theory as to why, once the government takes it,  
3 it's not a quiet title action?

4 MR. NELSON: Your Honor, the Quiet Title Act,  
5 by its terms, requires that the person who is asserting  
6 the action had an interest in the property.

7 JUSTICE SOTOMAYOR: So answer my question, or  
8 the one that Justice Breyer has said. Then it  
9 doesn't -- and the one Justice Kagan repeated yet  
10 again -- okay? What difference does it make that the  
11 government has taken title?

12 Whether the government has title or doesn't,  
13 under your theory, since this is not a quiet action --  
14 title action, anyone who is unhappy with the way the  
15 government took title could challenge it within 6 years.  
16 Isn't that the bottom line of your theory?

17 MR. NELSON: Yes, Your Honor. Anyone --

18 JUSTICE SOTOMAYOR: Absent laches. You say  
19 the only defense is laches.

20 MR. NELSON: No, Your Honor. The defenses  
21 would be laches. The zone of interest would apply.  
22 Other -- any other defense --

23 JUSTICE SOTOMAYOR: But the bottom line is,  
24 under your theory, as long as no landowner -- the person  
25 most directly affected by the taking, as long as that

1 person can't sue, but anybody who is an indirect person  
2 can sue within 6 years, anybody who says, I don't want  
3 the land, I just don't want the U.S. to have the land.

4 MR. NELSON: No, Your Honor. There is a  
5 distinction, I think, has to be made there. The --  
6 someone who has a right, title, or interest in the  
7 property, absent there being trust land, can sue to  
8 upset the government's title for 12 years under the  
9 Quiet Title Act. They could bring a claim under the  
10 APA, for up to 6 years, to govern the -- the -- or to  
11 challenge the government's decision to take the land --

12 JUSTICE SOTOMAYOR: But they can't undo the  
13 transfer. They can only get money.

14 MR. NELSON: Under the Quiet Title Act, they  
15 can only -- for -- for the 12-year period they can only  
16 undo -- they can -- excuse me. The government -- if  
17 they prevail, the government, correct, has the option of  
18 deciding whether to pay for the land or to -- to give it  
19 up.

20 JUSTICE KAGAN: I think --

21 JUSTICE SCALIA: Of course, the government  
22 can fix that. I mean, if this is, indeed, an  
23 inconvenient situation, that we think the government  
24 should not be in doubt for 6 years afterwards, I guess  
25 Congress can simply change it, right?

1 MR. NELSON: Yes, Your Honor.

2 JUSTICE SCALIA: Totally within the control  
3 of Congress. We -- we -- we don't have to make up some  
4 limitation to protect -- to protect the United States.

5 MR. NELSON: I agree, Your Honor.

6 JUSTICE SCALIA: Yes.

7 JUSTICE KAGAN: I suppose the question,  
8 Mr. Nelson, though, is whether you can provide us with a  
9 reason why Congress would have wanted what you call  
10 quiet title suits -- and -- and I agree that your  
11 definition is the traditional definition, when  
12 somebody -- when the plaintiff is a -- is, himself,  
13 asserting a right or interest -- why those suits --  
14 suits should be barred, but your suit, involving a third  
15 party, should not be barred.

16 What could possibly be the reason to  
17 distinguish between those two sets of cases? Now, you  
18 might just say, I don't have to give you a reason, this  
19 is what the result of the statute says. But, if I say,  
20 just try to provide me with a reason why Congress would  
21 have wanted that distinction, what would you say?

22 MR. NELSON: Your Honor, I -- I guess I would  
23 first say that because relief under the APA is different  
24 than relief under the Quiet Title Act, someone with a  
25 right, title, or interest in the property can assert the

1 same claim that Mr. Patchak can, in spite of the fact  
2 that they have that right, title, or interest, under the  
3 APA, as long as they do not seek, under the APA, to  
4 quiet title in themselves.

5 Second, with regard to why this provision  
6 would -- this provision is there -- I'm sorry, Your  
7 Honor, I have to acknowledge, I've lost track of your  
8 question.

9 Have I responded? Or can you restate it for  
10 me?

11 JUSTICE SCALIA: What -- what about this as a  
12 reason? When you prevail in a quiet title action, the  
13 only way the government can get off the hook is to give  
14 you the land, if it's -- if it's within, what, the 6  
15 years, or pay you money, if it's after 6 years, but  
16 within 12. Whereas, in your case, I suppose the  
17 government could moot the suit, moot the suit, by simply  
18 disallowing gambling. Can -- can the government do  
19 that?

20 MR. NELSON: Your Honor --

21 JUSTICE SCALIA: Once it has told the tribe  
22 that they can have -- I mean, this suit could be --  
23 could go away, so long as the tribe does not run a  
24 casino, isn't that right? That's your -- that's the  
25 gravamen of your complaint.

1 MR. NELSON: That is the gravamen of the  
2 injury, yes, Your Honor.

3 JUSTICE SCALIA: So I guess you -- you could  
4 be a happy fellow if -- so long as the tribe doesn't  
5 build a casino; whereas, in -- in quiet title cases, the  
6 only way you can make a happy fellow out of the  
7 plaintiff is to give him the land, right?

8 MR. NELSON: Or to pay him for it, yes, Your  
9 Honor.

10 Unless the Court has any further questions, I  
11 cede the remainder of my time.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Miller, you have 4 minutes remaining.

14 REBUTTAL ARGUMENT OF ERIC D. MILLER

15 ON BEHALF OF THE PETITIONERS IN NO. 11-247

16 JUSTICE KENNEDY: Mr. Miller, one -- one  
17 question, if -- if I may. The government takes the  
18 position -- at least this was the way the Respondent  
19 puts it -- that it can basically moot their action by  
20 turning this into a quiet title action, just by taking  
21 title. And let's -- let's assume that that's one  
22 characterization of your position. And the Respondent,  
23 on the other hand, says, oh, well, this is an APA  
24 action, we can -- we can wait forever, at least for 6  
25 years.

1           Is there some midway position that the  
2 government can't moot the case too soon, that it must  
3 wait a reasonable time? Or is -- is there no basis in  
4 the statute or in the cases for that position to hold?

5           MR. MILLER: So, if I understand correctly,  
6 you're asking about the case where the -- the lawsuit is  
7 filed before the land has been transferred?

8           JUSTICE KENNEDY: Yes, yes.

9           MR. MILLER: I don't know of any basis for  
10 restricting the government's ability to do that, I mean,  
11 short of the plaintiffs obtaining an injunction from the  
12 court. I mean, I guess the broader point I would make  
13 about that timing question is that the -- the court of  
14 appeals --

15           JUSTICE KENNEDY: Well, in other words  
16 you're -- you're sticking with your position. You say  
17 you -- you can basically moot a suit at any point you  
18 want just by taking title, so you're -- you're not  
19 accepting any qualification to that proposition.

20           MR. MILLER: That -- that is our position. I  
21 would just emphasize that that was not the basis of  
22 the -- the ruling of the court of appeals. The court of  
23 appeals held that it doesn't matter when the suit is  
24 filed, and under the court's analysis --

25           JUSTICE KENNEDY: All or nothing, okay.

1           MR. MILLER: -- it would be exactly the same,  
2 even if it was filed later. And I think the -- the  
3 error in that analysis is -- is that the question here  
4 is not whether Patchak's suit is a Quiet Title Act  
5 action. The question is whether the Quiet Title Act  
6 expressly or impliedly precludes relief under Section  
7 702, and the answer to that question is -- is yes.

8           And I'd just like to make two points about  
9 that. The first is that the general principle  
10 recognized by this Court, in *Brown v. GSA* and a number  
11 of other cases, is that, when you have a narrowly drawn  
12 remedial scheme for a particular subject, that that  
13 precludes resort to more general remedies. And, here,  
14 the Quiet Title Act is exactly such a scheme.

15           It's the mechanism for adjudicating a  
16 disputed title to real property in which the United  
17 States claims an interest. And it has its own  
18 procedures, its own statute of limitations --

19           JUSTICE KAGAN: Well, but -- but, in saying  
20 that, you have just broadened or, arguably, you have.  
21 If -- if you think that the quiet title action is really  
22 about the narrower set of cases, which is when a person  
23 himself claims title, how can you get from that to say  
24 that there is an express or an implied refusal of -- of  
25 this kind of claim?



1           MR. MILLER: I think, for two reasons. And  
2 the first is, just that -- that first sentence of  
3 2409a(a), which is, you know, to adjudicate a disputed  
4 title to land on which the United States claims an  
5 interest, that's a perfect description of what this case  
6 is.

7           And the -- the second is that the last  
8 sentence of Section 702 directs our attention to whether  
9 the relief is expressly or impliedly forbidden by  
10 another statute. And the relief that is sought here is  
11 an order compelling the Secretary to relinquish title on  
12 behalf of the United States to this land. And --

13           CHIEF JUSTICE ROBERTS: What -- do -- do  
14 other consequences, other than the ability of the  
15 Secretary to take land in trust, flow from whether or  
16 not a tribe is -- is recognized in 1934?

17           MR. MILLER: I -- I'm not aware of any. I'm  
18 not sure that there aren't any others, but --

19           JUSTICE SCALIA: All right. Do you have any  
20 concern that the government will get hoist by its own  
21 petard?

22           What your argument -- the conclusion to which  
23 your argument leads is that this individual or any  
24 individual claiming that the government took title  
25 incorrectly can sue under the Quiet Title Act, even if

1 they don't claim that title was taken from them. Are  
2 you sure that's good for the government?

3 MR. MILLER: Well, this -- this action would  
4 be barred under the Quiet Title Act because the Quiet  
5 Title Act expressly precludes this relief, where --  
6 where Indian trust land is at issue, where the relief  
7 that's sought is an injunction compelling relinquishment  
8 of title without the option of paying damages --

9 JUSTICE SCALIA: Of course, that's -- that's  
10 not the only time the government takes land, right?

11 MR. MILLER: Well, and the Quiet Title Act,  
12 section (d) requires, in a suit under the Quiet Title  
13 Act, the plaintiff to identify his interest in the land.

14 CHIEF JUSTICE ROBERTS: Mr. Miller, I  
15 mentioned, earlier, your footnote 1 in your reply brief,  
16 about whether the time of filing question for sovereign  
17 immunity purposes is limited to diversity cases. Are  
18 there -- you cite one case. Are there others going the  
19 other way?

20 MR. MILLER: I'm -- I'm not aware of others,  
21 but --

22 CHIEF JUSTICE ROBERTS: What --

23 MR. MILLER: -- I can't say with confidence  
24 that there aren't any others.

25 There -- one point I would make on that is

1 just refer you to the -- the Florida Prepaid case from  
2 1998, which was about state sovereign immunity, and  
3 which explained that a state may condition its waiver of  
4 sovereign immunity and may change that in the course of  
5 the litigation. And I think that's another analogy that  
6 might be instructive here.

7 CHIEF JUSTICE ROBERTS: So -- so this suit  
8 would come out the other way, if the person objecting  
9 was just over the border in -- in Indiana, instead of in  
10 Michigan? Because there would be -- it could be brought  
11 as a diversity suit?

12 MR. MILLER: Well, it would --

13 CHIEF JUSTICE ROBERTS: I'm assuming --

14 MR. MILLER: It would still be -- sovereign  
15 immunity would still apply. Sovereign immunity would  
16 bar relief, even if the basis for jurisdiction were --  
17 were diversity, rather than --

18 CHIEF JUSTICE ROBERTS: Even if -- even if it  
19 were a suit against the tribe, it would still be, not a  
20 diversity action, but a Federal cause of action?

21 MR. MILLER: Our point is that the reason  
22 it's barred is because of sovereign immunity. When --  
23 the time of filing in diversity cases refers to, if  
24 the -- the citizenship of the parties changes during the  
25 course of the litigation, that doesn't -- my

1 understanding is that doesn't defeat diversity. That's  
2 the -- the nature of that exception.

3 CHIEF JUSTICE ROBERTS: Okay. Thank you,  
4 counsel.

5 MR. MILLER: Thank you.

6 CHIEF JUSTICE ROBERTS: The case is  
7 submitted.

8 (Whereupon, at 11:08 a.m., the case in the  
9 above-entitled matter was submitted.)

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